Supreme Court, U. S.
FILED
JUN 29 1976

Supreme Court of the United States

October Term, 1975
No. 75-1890

DIMITRI'S GOLDEN STAR, INC., and
DIMITRI VALIANT,
Petitioners,

vs.

ARTHUR TREACHER'S FISH & CHIPS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

LEANZA, LONGANO, FARINA, MENDELSOHN
& PAPANDREAS
JOHN G. PAPANDREAS
1006 Citizens Building
Cleveland, Ohio 44114
Attorneys for Petitioner, Dimitri's Golden Star, Inc.

TEAFORD & BERNARD
HAMILTON J. TEAFORD
100 East Broad Street
Columbus, Ohio 43215
Attorneys for Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS

Opinion Below 1

Jurisdiction 1

Constitutional Provision Involved 2

Questions Presented 2

Statement of the Case 2

Argument 5

I. The Appellate Court Erred in Holding That the Trial Court's Ruling, That the February Agreement Was Effectively Cancelled by Arthur Treacher's, Was Not Against the Weight of the Evidence 5

II. The Appellate Court Erred in Holding That the Trial Court's Ruling, That the Consideration for the February Agreement Was Not Paid by Valiant and Accepted by Arthur Treacher's on June 29, 1973, Was Not Against the Weight of the Evidence 7

Conclusion 9

Appendix A:

Order of the Court of Appeals (April 7, 1976) .. A1

Order of the District Court (March 21, 1975) ... A2

Judgment of the District Court (March 25, 1975) A11

Supreme Court of the United States

October Term, 1975
No. _____

DIMITRI'S GOLDEN STAR, INC., and
DIMITRI VALIANT,
Petitioners,

vs.

ARTHUR TREACHER'S FISH & CHIPS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

OPINION BELOW

The United States Sixth Circuit Court of Appeals rendered its judgment on April 7, 1976. A copy of the judgment is attached hereto as Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1), which states:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari; granted upon the petition of any party to any civil . . . case, before or after rendition of judgment or decree.

CONSTITUTIONAL PROVISION INVOLVED

This case involves no constitutional provision, treaties, statutes, ordinances or regulations.

QUESTIONS PRESENTED

1. Whether the Appellate Court erred in holding that the trial court's ruling, that the February Agreement was effectively cancelled by Arthur Treacher's, was not against the weight of the evidence.

2. Whether the Appellate Court erred in holding that the trial court's ruling, that the consideration for the February Agreement was not paid by Valiant and accepted by Arthur Treacher's on June 29, 1973, was not against the weight of the evidence.

STATEMENT OF THE CASE

This cause was filed in May, 1974 as a breach of contract action in the U. S. District Court, Northern District of Ohio, Eastern Division.

Jurisdiction was based upon diversity. Petitioner Dimitri Valiant ("Valiant") was a resident of Pennsylvania; Petitioner Dimitri's Golden Star, Inc. ("Golden Star") was a Pennsylvania corporation; and Respondent Arthur Treacher's Fish & Chips, Inc. ("Treacher's") was an Ohio corporation.

Because the Appellate Court's ruling is based entirely on an examination of the trial court transcript and makes no specific reference to that document, all references to evidentiary matters, except those to the lower Court's opinion, will be based upon the Appendix submitted to the Appellate Court, a certified copy of which has been filed with this Court.

Valiant and Golden Star alleged in their complaint that on December 19, 1972, Valiant entered into a contract with Arthur Treacher's wherein, for a consideration of Five Thousand Dollars ($5,000.00), Arthur Treacher's agreed to reserve for Valiant the franchise rights in two counties located in Maryland (Appendix, 52). The reservation was valid until February 20, 1973 at which time an Area Licensing Agreement was to be executed.

On February 14, 1973, Golden Star exercised the option and entered an Area Licensing Agreement for one of the counties previously reserved by Valiant (Appendix, 53) and a right of first refusal on the other county (Appendix, 54). All parties agreed that the execution of the Agreement of December 19, 1972, by Valiant as an individual, and execution of the February 14, 1973 Agreement ("February Agreement") by Golden Star as a corporation, met the requirements of the earlier agreement (Appendix, 10).

The initial $5,000 paid by Valiant in December, 1972 was credited toward the Twenty Thousand Dollars ($20,000.00) consideration provided for in the Licensing Agreement. The balance of $15,000 was paid by a $10,000 note signed by Valiant and a $5,000 check from Golden Star, upon which payment was later stopped because Valiant's brothers, who were to invest in the project, had changed their minds (Appendix, 11, 12).

Subsequently, a number of phone calls and correspondence passed between Robert Maloney, Vice-President of Arthur Treacher's, and Valiant regarding the stopped check and the parties' rights pursuant to the February Agreement.

However, as late as June 7, 1973, in spite of earlier letters from Maloney cancelling the February Agree-

ment, he still felt that the contract was valid and gave Valiant an extension of time in which to complete performance (Appendix, 13).

On June 29, 1973 Valiant went to the offices of Arthur Treacher's and met with Maloney. Valiant testified that at that meeting Maloney's secretary, Charlene Holt, with Maloney's concurrence, typed a $5,000 check to replace the check upon which payment had been stopped (Appendix, 14). Valiant further testified that Maloney accepted the check thereby making the February Agreement fully executed, insofar as payment of consideration, and that they parted amicably (Appendix, 15).

Arthur Treacher's alleged that the check was not accepted, that there was no valid contract between the parties, and that they subsequently sold the counties, reserved for Valiant and Golden Star, to a third party (Louis Alexis).

Following a non-jury trial, the trial court ruled in favor of the defendant-respondent. An appeal was taken to the United States Court of Appeals for the Sixth Circuit which issued a one page opinion holding that the trial court's evidentiary findings were clearly not erroneous.

ARGUMENT

I. THE APPELLATE COURT ERRED IN HOLDING THAT THE TRIAL COURT'S RULING, THAT THE FEBRUARY AGREEMENT WAS EFFECTIVELY CANCELLED BY ARTHUR TREACHER'S, WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE.

The trial court apparently decided that the February Agreement was rescinded by Arthur Treacher's in one of three ways: namely, (1) by a letter dated March 19, 1973 from Maloney to Valiant; (2) in a telephone conversation of June 7, 1973 between Valiant, Alexis and Maloney, and (3) by a letter dated June 18, 1973 from Maloney to Valiant. None of these findings are supported by the evidence.

The letter of March 19th is of no relevance to the case since it was followed over the next several months by various conversations and meetings between the parties which clearly showed that a binding agreement between the parties continued to be in effect after March 19, 1973.

At some time after the mailing of this letter, Valiant arranged to meet with Maloney and Alexis on June 7, 1973. Alexis was invited because Valiant hoped he would agree to become an investor in the franchise. Valiant was unable to attend the meeting, but did take part in a three-way telephone conversation in which Maloney told Valiant that the counties were still his and that he should come to Columbus to finalize the transaction (Appendix, 22, 23, 13). Maloney testified that this extension was for a period of one week, until June 12th (Appendix, 24), although Valiant testified he did not remember whether that deadline was set by Maloney (Appendix, 25, 26).

Subsequent to that conversation, Maloney continued to deal with Valiant and Golden Star in a manner clearly evidencing that the petitioners' rights under the February Agreement had never been rescinded.

On June 18, 1973, Maloney sent another letter to Valiant stating that all his rights under the February Agreement were terminated (Appendix, 56). That letter, alone, is sufficient proof that, contrary to the trial court's ruling, Valiant's and Golden Star's rights in the February Agreement had not been rescinded by the letter of March 19th but had been extended by Maloney to at least June 12, 1973.

On June 18th and June 19th, after he wrote the letter, Maloney again talked to Valiant regarding the February Agreement (Appendix, 27, 28, 29). Although Maloney knew he had written the letter when he talked to Valiant, he did not mention its contents to Valiant or advise him that he considered Valiant's rights terminated (Appendix, 29, 30). On the contrary, Maloney clearly testified that he told Valiant that if he was still interested in concluding the contract he should come to Columbus and pay the consideration, which Valiant subsequently did on June 29, 1973 (Appendix, 29, 30).

Valiant testified that on June 29th Maloney accepted his check for $5,000 as payment for the February Agreement thereby concluding that contract.

II. THE APPELLATE COURT ERRED IN HOLDING THAT THE TRIAL COURT'S RULING, THAT THE CONSIDERATION FOR THE FEBRUARY AGREEMENT WAS NOT PAID BY VALIANT AND ACCEPTED BY ARTHUR TREACHER'S ON JUNE 29, 1973, WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE.

The Court's finding (Paragraph 17, Order—Appendix A, A7) that Maloney refused to accept Valiant's check at the June 29, 1973 meeting and that Valiant's bank account contained insufficient funds, is not supported by the evidence.

Valiant testified that his bank check (Appendix, 59) was typed by Charlene Holt, Maloney's secretary, at Maloney's request, and was accepted by Maloney (Appendix, 32, 33, 34, 35).

Charlene Holt testified at trial that the check was typed by her at Valiant's request just prior to his meeting with Maloney (Appendix, 36). However, that testimony was a direct contradiction of her earlier deposition testimony when she stated that the request to type the check was made by Valiant in Maloney's presence (Appendix, 37), and that she typed the check with Maloney's approval (Appendix, 38), indicating his acceptance of the check as payment for the February Agreement.

Arthur Treacher's called another interesting witness to attempt to prove that the June 29th meeting was not the final consummation of the February Agreement. Nicholas Moraitis, Vice-President of Arthur Treacher's, testified that he was present at the June 29th meeting (Appendix, 42); that Maloney was "very mad, very up-

set" (Appendix, 43); and that Valiant dropped the check on Maloney's desk and walked out (Appendix, 43).

Moraitis's testimony was completely discredited by Maloney and Holt, who testified that Moraitis was not even present at the June 29th meeting (Appendix, 30, 44, 40).

Furthermore, Moraitis's testimony regarding the atmosphere at that meeting was also false. Holt testified that the general tone of the meeting was ". . . a pleasant atmosphere of a contract coming to a close. . ." (Appendix, 39), and that after the meeting Maloney drove Valiant to the airport (Appendix, 40, 41). The atmosphere that existed at the meeting was hardly one of final frustration and the termination of a long sought after contract.

It is not believable that a man of Maloney's experience would allow a franchise to "drop" an unwanted check on his desk, immediately offer to drive him to the airport as a convenience, and then hold the allegedly unwanted check for over one month prior to returning it to Valiant (Appendix, 45).

Furthermore, Maloney's discussion with Valiant on June 29th regarding problems with possible building moratoriums in the franchise area (Appendix, 15, 46, 47, 48, 49) lend further credence that the June 29th meeting was a final consummation of the February Agreement.

The Court's further finding (Paragraph 17, Opinion—Appendix A, A7) that the account upon which the June 29th check was drawn did not contain sufficient funds until July 12, 1973, is without basis. The check was drawn on a Friday, June 29, 1973, and sufficient

funds were deposited by Valiant on Monday, July 2, 1973 (Appendix, 50, 51); had the check been deposited in the ordinary course of business, it would have been paid by Valiant's bank.

CONCLUSION

The testimony and documentary evidence presented to the Courts below clearly show that Arthur Treacher's, through its agent, Maloney, extended to Valiant a continuing offer of the terms of the February Agreement. There undoubtedly was a great deal of frustration for both parties during the period from February to June, 1973.

Nevertheless, Maloney, by his words and actions, clearly kept that offer open, up to the meeting of June 29, 1973. The atmosphere at that meeting was characterized as friendly, which is hardly the setting for the abrupt ending of over four months of attempting to conclude a contract. If, in fact, Maloney had not accepted Valiant's check at that meeting, he would have returned it immediately with a letter covering his position as he had done in the past.

If anyone vacillated in their position, it was Arthur Treacher's by periodically writing letters of rescission and then reopening the offer.

Valiant was, at all times, attempting to raise the money to pay the consideration. At no time did he decide not to accept the terms of the February Agreement.

When he finally met with Maloney on June 29, 1973 to conclude the transaction he left the meeting believing, with good cause, that his check had been ac-

cepted; that the contract was finally consummated; and that all he had to do was await Maloney's report on the possible building moratoriums.

In spite of the clear evidence presented, the courts below erroneously held that the February Agreement was cancelled.

Consequently, Petitioners request that this Court grant their petition for writ of certiorari.

Respectfully submitted,

JOHN G. PAPANDREAS
LEANZA, LONGANO, FARINA, MENDELSOHN & PAPANDREAS
1006 Citizens Building
Cleveland, Ohio 44114
(216) 621-8600
Attorneys for Petitioner, Dimitri's Golden Star, Inc.

APPENDIX A

ORDER OF THE COURT OF APPEALS

(Filed April 7, 1976)

No. 75-1880

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DIMITRI'S GOLDEN STAR, INC., et al.,
Plaintiffs-Appellants,

v.

ARTHUR TREACHER'S FISH & CHIPS, Inc.,
Defendant-Appellee.

ORDER

Before: PHILLIPS, *Chief Circuit Judge*, and CELEBREZZE and MILLER, *Circuit Judges.*

This matter having been submitted to the Court on the record on appeal, and the briefs and oral arguments of counsel for the parties, and the Court being fully advised in the premises having concluded that the evidence adduced at trial created issues of fact for resolution by the trial Court, and the Court having resolved those issues against the Plaintiffs-Appellants, and it being concluded that the trial Court's findings are not clearly erroneous,

It IS ORDERED that the judgment of the District Court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT
JOHN P. HEHMAN, *Clerk*

ORDER OF THE DISTRICT COURT

(Filed March 21, 1975)

Civil Action No. C74-452

THE UNITED STATES DISTRICT COURT

THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DIMITRI'S GOLDEN STAR, INC., et al.,
Plaintiffs,

v.

ARTHUR TREACHER'S FISH & CHIPS, INC.,
Defendant.

ORDER

KRUPANSKY, *J.*

This is an action for breach of contract. Jurisdiction of this Court is premised upon diversity of citizenship.

Plaintiff alleges a contract with defendant whereby defendant granted to it an exclusive license to construct, own and operate four Arthur Treacher's Fish & Chips Restaurants in Montgomery County, Maryland; that plaintiff performed all conditions required by it to be performed; that subsequently the defendant breached the said contract by refusing the license provided for in the contract and in otherwise refusing to comply with the terms and conditions of the agreement.

The action was tried to the Court on January 27 and 28, 1975. Upon the record in its entirety including the pleadings, evidence, exhibits and briefs, the Court finds:

1. Plaintiff commenced negotiations with Nick Moraitis, a vice president of Arthur Treacher's culminating in the following agreement dated December 19, 1972:

AGREEMENT

This agreement made and concluded this 19th day of December, 1972, by and between Arthur Treacher's Fish & Chips, Inc., of 2011 Riverside Drive, Columbus, Ohio, and Dimitri Valiant, 1729 Bayview, Erie, Pa. 16505.

In consideration of the payment by Dimitri Valiant of $5,000.00, receipt of which is hereby acknowledged, Arthur Treacher's agrees to reserve Montgomery and Prince Georges Counties, Maryland, pending the execution of Arthur Treacher's standard license contract no later than February 20, 1973, copy of Area License Contract attached.

The Area License Contract will specify a ten unit performance, to be completed within 3 years. Total initial fee of $50,000.00 at the execution of the area contract. Dimitri Valiant will pay an additional $20,000.00 in cash, and sign a note for $25,000.00 payable over a three year period. Copy of note attached.

The $5,000.00 paid today will apply to the total initial franchise fees of $50,000.00 providing the Area License Contract is executed on or before February 20, 1973, otherwise the $5,000.00 will be liquidated damages to be the entire property of Arthur Treacher's Fish & Chips, Inc., for the consideration of reserving the territory as hereinbefore delineated.

2. The form of the Agreement was to permit plaintiff to arrange for the sale of various restaurant interests in Erie, Pennsylvania, and to provide adequate time for Dimitri Valiant, the principal stockholder and officer of plaintiff corporation, to move his family to Maryland.

3. On February 14, 1973, Valiant traveled to Columbus and met with Moraitis and Robert W. Maloney, another vice president of defendant corporation. Negotiations of that date resulted in the execution of an Area Licensing Agreement, which provided in substance for payment of a consideration of $20,000, for which plaintiff would receive an exclusive franchise to construct, within three years, and operate four Arthur Treacher's Fish and Chip units in Montgomery County, Maryland; the $5,000 payment advanced by Valiant on December 19, 1972 was to be applied as a credit against the $20,000; an additional $5,000 was paid contemporaneously with the execution of the agreement by corporate check No. 1410 drawn upon the account of plaintiff, Golden Star, Inc., and the balance of $10,000 was evidenced by a personal promissory note signed by Valiant.

4. In addition to the area licensing agreement executed on February 14, 1973, defendant on the same date, by letter agreement, extended to the plaintiff a one-year right of first refusal to execute licensing agreements for Prince George County, Maryland.

5. Valiant executed the franchise agreement for Montgomery County on February 14, 1973, upon the expectation that his two brothers would participate in financing and operating the business undertakings. On February 14, 1973, subsequent to executing the

agreement, his brothers advised him by telephone of their refusal to participate.

6. On February 15, 1973, Valiant telephoned Maloney from his home in Erie, Pennsylvania and requested that he withhold presentment of check No. 1410 to the bank for payment. Maloney advised that the check had already been negotiated.

7. On February 19, 1973, Valiant telephoned Moraitis in Columbus, Ohio, advised him of his predicament and requested the latter to prevail upon Maloney to extend compliance with the agreement of February 14, 1973 to June 1, 1973. Immediately after speaking with Moraitis, Valiant directed his bank to refuse payment of check No. 1410 dated February 14, 1973. The bank complied and the check was returned to defendant marked "Payment Stopped."

8. On March 1, 1973, Maloney notified Valiant by letter (Defendant's Exhibit 1):

> The five thousand dollar check, dated February 14, 1973, which was to be payment for the Montgomery County, Maryland, area license was returned by the bank marked 'payment stopped'.
>
> Since the cash payment is the consideration which our company receives to make the contract viable, we would like to know your intention concerning this matter.
>
> However, for the present, we cannot consider the contract in full force and effect.
>
> Please let us hear from you as soon as possible, so that we may be in position to protect your interests in this area as far as possible.

9. On March 16th and 17th, Valiant again telephoned Moraitis in Columbus requesting him to intercede with Maloney on his behalf. Thereafter, Valiant made no further effort to communicate with the defendant company or its officers until mid-May of 1973.

10. By certified letter of March 19, 1973 (Plaintiff's Exhibit 2) Maloney referenced his letter of March 1, 1973, charging plaintiff with a default of the February 14, 1973, agreement, and further advised Valiant that other individuals were interested in the territories of Montgomery and Prince George Counties, Maryland, and solicited a response of Valiant's intent by March 31, 1973. Valiant failed to respond.

11. Although Valiant failed to respond to the defendant's communications of March 1st and 19th, he was, during this same period, negotiating with Louis Alexis to arrange a partnership, or some other working business relationship, under the terms of which financing of the Montgomery and Prince George Counties' franchises could be implemented. During this same period, he was making no effort to sell his restaurant operations in Erie. To the contrary, he was actively engaged in expanding his businesses in that area.

12. In mid-May 1973, Valiant, by telephonic communication, arranged an appointment for himself and Alexis with Maloney in Columbus for June 7, 1973 for the purpose of further negotiating the Montgomery and Prince George franchises.

13. Prior to the scheduled meeting, Valiant again urged Moraitis to intercede with Maloney on his behalf on this occasion to insure a 50 percent participation in any arrangement which might result on June 7, 1973, between Alexis and defendant.

14. Valiant did not attend the meeting of June 7, 1973, although Alexis proceeded to Columbus and discussed franchising procedures for Montgomery and Prince George Counties with Maloney.

15. During the course of this conference, Alexis returned a telephone call to Valiant, during which a three-way conversation occurred between Valiant, Alexis and Maloney, which resulted in Valiant's expressing dissatisfaction with Alexis' proposal to him whereupon he informed Maloney and Alexis that he was asserting exclusive licensing rights to both counties. Maloney, thereupon, advised Valiant that he had no existing rights to any franchises. Maloney suggested a meeting with Valiant in Columbus during the week of June 12, 1973 to afford Valiant an opportunity to clarify his position and demands.

16. Valiant did not respond to Maloney's invitation, whereupon Maloney advised Valiant by letter dated June 20, 1973:

> Since we have heard nothing further from you, we hereby declare that you have forfeited all rights to consideration.
>
> We have again placed the territory as available for license, and will conclude a contract with the next qualified party.

17. On June 29, 1973, Valiant arrived at Maloney's office unannounced and requested a meeting. During the course of the meeting Valiant insisted upon the validity of the February 14, 1973, agreement and attempted to give Maloney a $5,000.00 check which Maloney refused to accept. Valiant left the check on Maloney's desk. The account upon which the check was drawn did not contain sufficient funds to provide

payment thereof. Funds were not deposited into the bank account until July 12, 1973.

18. On July 23rd and 24th, Dimitri Valiant telephoned Maloney who advised him that his check had not been accepted or deposited since no contract existed between the parties.

19. On August 2, 1973, Valiant again arrived at Maloney's office in Columbus unannounced. During the ensuing conference, Valiant attempted to reinstate the terms of the contract of February 14, 1973, which Maloney resisted.

Subsequent to Valiant's departure, Maloney by letter returned Valiant's undeposited $5,000.00 check, together with defendant's check in the amount of $5,000.00 representing the deposit made by Valiant on December 19, 1972.

The consideration for defendant's promise to reserve Montgomery County, Maryland, for the plaintiff was the actual payment of the franchising fee and the promise of plaintiff to construct certain Arthur Treacher restaurant units within a given period of time. In other words, the contract was to be unilateral in part and bilateral in part. Plaintiff's failure, therefore, to pay the entire cash amount due amounted to a partial failure of consideration. Generally, a failure of consideration imparts a breach of contract. However, a partial failure of consideration will excuse the performance of a contract only when such partial failure goes to the "root" of the contract. *Colonial Insurance Company v. Grau*, 129 N.E. 2d 491 (Ct. of Appeals, Ohio 1955); 17 Am. Jur. 2d, *Contracts* §398; Corbin on Contracts §690.

The parties to this proceeding treated the payment of the cash consideration as a condition precedent. A condition precedent is "a fact . . . which . . . must exist or occur before a duty of immediate performance of a promise arises, . . ." Restatement of the Law, *Contracts* §250. Both parties intended and recognized that defendant's performance of the contract depended upon full payment of $20,000 cash consideration no later than March 31, 1973. The failure of plaintiff to make payment in full reflects upon the good faith intentions of Valiant to comply with the remaining terms of the agreement.

Accordingly, the agreement executed on February 14, 1973, was properly rescinded as of March 31, 1973 due to the partial, but substantial, failure of consideration.

Assuming *arguendo*, that defendant had extended the terms of the February 14, 1973, agreement to June 1, 1973, nevertheless, plaintiff again failed to tender any monies until June 29, 1973. *See*, 1 Williston, *Contracts*, §53.

Subsequent to the rescission of the February 14, 1973, agreement, plaintiff was offered several opportunities to reopen negotiations in Columbus. During plaintiff's unannounced visit to Columbus on June 29, 1973, Maloney reasserted his position that plaintiff breached the February 14, 1973, agreement, however, he extended an opportunity to plaintiff to reopen negotiations on new terms and conditions which apparently were unacceptable to the plaintiff who persisted upon reinstatement of the February 14th terms. The meeting culminated in an impasse between the parties. 1 Williston, *Contracts*, §51; 11 O. Jur. 2d *Contracts*, §23. Plaintiff having rejected Maloney's new proposals an acceptance

necessary for the creation of any new contract was absent. 1 Williston, *Contracts*, §64.

Assuming the accuracy of plaintiff's remaining assertion and accordingly construing the communications between the parties during the period subsequent to mid-May of 1973, as a continuing offer of the February 14th terms, plaintiff cannot, nonetheless, seriously contend that such offer was not revocable at any time prior to acceptance. *Longworth v. Mitchell*, 26 O.S. 334 (1875); 11 O. Jur. 2d *Contracts*, §§26, 27. Apparent from the evidence, Maloney clearly revoked any remaining offer by his letter of June 20, 1973. Plaintiff's attempts to revive the terms of the February 14th offer thereafter, including the purported delivery of a check in the amount of $5,000 on June 29, 1973, were consistently rejected by defendant.

Accordingly, Judgment is hereby entered for defendant Arthur Treacher's Inc.

IT IS SO ORDERED.

/s/ ROBERT B. KRUPANSKY
United States District Judge

JUDGMENT OF THE DISTRICT COURT

(Dated March 25, 1975)

Civil Action File No. C74-452

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DIMITRI'S GOLDEN STAR, INC., et al.

vs.

ARTHUR TREACHER'S FISH & CHIPS, INC.

JUDGMENT

This action came on for trial before the Court, Honorable Robert B. Krupansky, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the complaint herein is hereby dismissed at plaintiffs' costs.

IT IS FURTHER ORDERED that the Order filed herein on March 25, 1975 constitutes the Court's Findings of Fact and Conclusions of Law pursuant to Rule 52(a), Federal Rules of Civil Procedure.

/s/ ROBERT B. KRUPANSKY
United States District Judge